(13)

168

NO. 09-1557

Supreme Court, U.S.
FILED
AUG 09 2010
OFFICE OF THE CLERK

In The
Supreme Court of The United States

PATCO ENERGY EXPRESS, LLC,
PATCO ENERGY EXPRESS II, LLC,
PATCO ENERGY EXPRESS III, LLC,
Georgia Limited Liability Companies,

Petitioners,

v.

MICHAEL G. LAMBROS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

WILLIAM EUGENE RUTLEDGE
Counsel of Record
RUTLEDGE & YAGHMAI
3800 Colonnade Parkway, Ste 490
Birmingham, AL 35243
Telephone: 205.969.2868
williamerutledge@aol.com

TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

Certiorari Should Be Granted 2

The Decision in *Barton v. Barbour* is Limited to its Facts 3

Dictum in *Barton v. Barbour* Should Not Be Followed 5

Two Statutes Have Abrogated *Barton* 5

Lambros' Appointment as Receiver Was Void *Ab Initio* 7

Respondent Erroneously Asserts He Has Absolute or Qualified Immunity 9

Qualified Immunity 10

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Andujar v. Rodriguez, 486 F.3d 1199
(11th Cir. 2007) 10

Barton v. Barbour, 104 U.S. 126,
26 L.Ed. 672 (1881) ..... *passim*

Central Virginia Comm. College v. Katz,
546 U.S. 356, 126 S.Ct. 990,
163 L.Ed.2d 945 (2006) 5

Cisco v. Georgia, 285 Ga. 656,
680 S.E.2d 831 (2009) 7, 9

Cohens v. Virginia, 6 Wheat 264,
19 U.S. 264, 5 L.Ed. 257 (1821) 5

Edwards v. Prime, Inc., 602 F.2d 1276
(11th Cir. 2010) 4

Fuentes v. Shevin, 407 U.S. 67
92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) 11

Grayden v. Rhodes, 345 F.3d 1225
(11th Cir. 2003) 12

Hollis v. Itawamba County Loans, et al.,
657 F.2d 746 (5th Cir. 1981) 11

In re Automotive Professionals, Inc.,
2007 WL 198595 *7 (Bkrptcy. N.D. Ill. 2007) 7

McKinney v. Pate, 20 F.3d 1550
(11th Cir. 1994) 12

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865
(1950) 11

Pearson v. Callahan, _____ U.S. _____,
129 S.Ct. 808, 172 L.Ed.2d 565 (2009) 11

Texas & Pacific Railway Co. v. Cox, 145 U.S.
593, 12 S.Ct. 905, 36 L.Ed. 829 (1892) 6

Watts v. BellSouth Telecomms., Inc.,
316 F.3d 1203 (11th Cir. 2000) 4

Codes

11 U.S.C. § 543(b) 6, 12

28 U.S.C. § 124 5

28 U.S.C. § 959(a) 6, 12

42 U.S.C. § 1983 12

Other

O.C.G.A. § 9-8-8 10

Rule 10(c), Supreme Court Rules 1, 2

Introduction

The question of the viability of the so-called *Barton* Doctrine is a matter which has not been decided by this Court but which should be under Supreme Court Rule 10(c). As shown below, the *Barton* Doctrine, as applied by nine of the eleven circuits, is a misapplication of the case of *Barton v. Barbour*, 104 U.S. 126, 26 L.Ed 672 (1881) which was confined to its facts and did not state a general rule as to whether receivers engaged in any activity could be sued without the permission of the appointing court. Certiorari should be granted on this ground.

Respondent in his Brief in Opposition ("Resp. Br.") asserts that since there is no split in the circuits on the issue of the meaning or viability of the so-called *Barton* Doctrine, this Court should deny the writ.

Petitioners respond that Supreme Court Rule 10(c) provides for certiorari in cases such as this one. Moreover, there is a split in the circuits on application of the *Barton* Doctrine as shown in Resp. Br. 7-8.

Respondent also asserts: (1) there is a viable *Barton* Doctrine derived from the 1881 *Barton v. Barbour* opinion of this Court; (2) that Respondent's appointment as *in personam* receiver was valid until the appointing statute was declared unconstitutional in *Cisco v. Georgia*; (3) Respondent was an *in rem* receiver and the *in rem* portion of the appointing

statute still stands; and (4) Respondent has judicial and qualified immunity.[1]

Petitioners reply: (1) there is no *Barton* Doctrine because the decision in *Barton v. Barbour* has been abrogated by statute; (2) The law of Georgia is that any act done pursuant to a statute subsequently declared unconstitutional such as Respondent's appointment as *in personam* receiver is void *ab initio*; (3) Respondent was not appointed as *in rem* receiver; (4) the appointing order shows there is no judicial immunity for this receiver; and (5) the constitutional violation is so well settled that qualified immunity cannot apply.

Certiorari Should Be Granted

Respondent argues that this case does not involve a split in the circuit and so certiorari should be denied. In footnote 2 on page 7 of Resp. Br., Respondent agrees that all circuits except the Fifth and Eighth have applied the *Barton* Doctrine. This represents a split in the circuits. Since *Barton v. Barbour* was decided 129 years ago, circuits which have not applied it can be considered to have rejected it.

Moreover, Rule 10(c), Supreme Court Rules, provides for certiorari where, as here, a court of appeals has decided an important question of federal law that has not been, but should be, decided by this

---

[1] The Eleventh Circuit in the opinion under review did not rule on this issue.

Court. Respondent claims great importance for the so-called *Barton* Doctrine. This Court has not decided if it has been abrogated by statute. The Eleventh Circuit says it has not. This Court should decide this important question.

The Decision in *Barton v. Barbour* is Limited to its Facts

The facts in the *Barton* case are that the receiver was operating a railroad and allegedly negligently injured a passenger riding on the railroad. The holding in the case was limited to those facts:[2]

> We therefore declare it as our opinion that when the court of one State has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty by carrying on the business to which the property is adapted, until such time as it can be sold with due regard to the rights of all persons interested therein, a court of another State has no jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the State in which he was appointed and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty in respect of such property (emphasis added)

Mr. Justice Miller dissented in *Barton* defining the decision as confined to the facts in the case.[3]

The only factual issue before the *Barton* Court was whether a receiver running a business could be sued without the permission of the appointing court. The decision was limited to deciding those facts. The *Barton* Court made only a passing reference to a "general rule" about suing receivers. *See Watts v. BellSouth Telecomms., Inc.*, 316 F.3d 1203 1207 (11th Cir. 2003) ("Whatever their opinions say, judicial decisions cannot make law beyond the facts of the case in which those decisions are announced"); and *Edwards v. Prime, Inc.*, 602 F.2d 1276 1298 (11th Cir. 2010) ("We have pointed out many times that regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case.")

---

[3] The decision which has just been announced declares that for these failures [negligent operation of railroad] he cannot be sued in a court of law, that by virtue of his receivership, he and all his acts, and the business of the road, are exempted from the operation of the common law, and that all parties deal with him on the implied understanding that they abandon the right to have their complaints tried by jury or by the ordinary courts of justice, and can only obtain such relief as may be had at the hands of a master in chancery of the court which appointed him. (emphasis added)

Dictum in *Barton v. Barbour* Should Not Be Followed

This Court is not bound to follow its *dictum* in a prior case. *Central Virginia Comm. College v. Katz*, 546 U.S. 356, 363, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006). At a very early date, Chief Justice Marshall explained why *dicta* are not binding. *Cohens v. Virginia*, 6 Wheat. 264, 19 U.S. 264, 5 L.Ed. 257 (1821):

> The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Two Statutes Have Abrogated *Barton*

The ruling as to a receiver operating a business has been abrogated by statute. On March 3, 1887, Congress adopted a statute abrogating *Barton v. Barbour*, (24 St. p. 552, c. 373) as corrected by the Act of August 13, 1888, (25 St. pp. 433, 436 c. 866).[4] This statute, codified as 28 U.S.C. § 124, was

[4] The relevant language is:

> That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave

the predecessor of the present identical statute, 28 U.S.C. § 959(a) adopted in 1948. Section 6 of the 1887 Act specifically repealed "all laws and parts of laws which conflict with" the Act. *Texas & Pacific Railway Co. v. Cox*, 145 U.S. 593, 601-602, 12 S.Ct. 905, 36 L.Ed. 829 (1892).

Congress thus agreed with the *Barton* dissent and adopted the 1887 Act to set aside the only decision actually made in *Barton* — a receiver operating a business could not be sued without the permission of the court appointing him.

In summary, *Barton* decided only that a receiver sued for acts in conducting a business of the receivership could not be sued without permission of the appointing court. In 1887 Congress enacted a statute which abrogated that decision. That statute is still in effect. There is no *Barton* Doctrine or even a viable *Barton* holding.

But, even if all of that is wrong in the eyes of this Court and it finds there was a binding decision in *Barton* to the effect that all receivers, no matter what they were doing, could only be sued with the permission of the appointing court, any such ruling was abrogated by 11 U.S.C. §543(b). This statute requires a receiver holding property subject to a

---

of the court in which such receiver or manager was appointed, but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager as appointed, so far as the same shall be necessary to the ends of justice.

state court's control to turn over the property to the federal court when he learns a suit over that property has been filed in federal court. The decisions cited in the original Petition show the applicability of § 543(b) to this case. *See In re Automotive Professionals, Inc.*, 2007 WL 198595 *7 (Bkrptcy. N.D. Ill. 2007), "Consequently, § 543(b) supersedes the *Barton* Doctrine with respect to a debtor bringing an action to compel the turnover of its property."

There is nothing left of the actual *Barton v. Barbour* holding or the holding the circuits have placed on it.

Lambros' Appointment as Receiver Was Void *Ab Initio*

Respondent argues that *Cisco v. Georgia*, 285 Ga. 656, 680 S.E.2d 831 (2009) declaring unconstitutional his appointment as an *in personam* receiver is irrelevant because: (1) he was duly appointed and served before the *Georgia v. Cisco* decision; and (2) he was also appointed an *in rem* receiver of the Stations. (Resp. Br. at 11.) Neither of those statements is correct as a matter of law.

The initial Petition cites the cases establishing that in Georgia action taken under an unconstitutional statute is void *ab initio* (Pet. At 26.) There is no refutation of any of these cases by Respondent.

Respondent asserts that the state court action named Cisco and his business entities *in personam* and "named" the Stations owned by Cisco's business entities "as defendants *in rem*." (Resp. Br. at 12.) The Stations are only "named" in the title of the complaint. There is no reference to them in the body of the complaint. In any event, this is not relevant because the appointing order is separate from the complaint, so who was a defendant in the complaint has no bearing on any issue in the case.

The receivership appointing court did not include the Stations in the injunction or receivership order.[5] This is the final refutation of Respondent's claim that he was an *in rem* as well as an *in personam* receiver because no property was included in the appointing order as subject to the receiver or otherwise.

---

[5] The appointing court introduced the injunction and receivership order with the following:

> II. DEFENDANTS SUBJECT TO ORDER
>
> The Defendants that are subject to this preliminary injunction **and receivership** (hereinafter called "Enjoined Defendants") are: Fairley Cisco, Cisco Travel Plaza, Inc., Cisco Travel Plaza II, Inc., Cisco Oil, Inc., Cisco Express, Inc., Cisco Enterprises, Inc., Althea Cisco Shave, Tammy Cisco Walker, Poor Boys Oil Co., Inc., (Adopting terms of 3/31 Consent Order), Alana McQuarry, (Adopting terms of 3/31 Consent order), United Fuel, Inc., Keldeep Sekhon, Kingsland Management, LLC, Kingsland Management II, LLC. (emphasis added)

Respondent relies on the footnote in *Cisco v. Georgia* court which stated that, "The complaint also included *in rem* forfeiture proceedings against the three truck stops." (emphasis added) (285 Ga. At 656, n.1, 680 S.E. 2d at 832 n.1.) This is irrelevant in view of the receivership appointing order leaving out the Stations or any other property.

Respondent Erroneously Asserts He Has Absolute or Qualified Immunity

Respondent alleges that "as a receiver" he is "entitled to both absolute and qualified immunity." (Resp. Br. at 13). First of all, Respondent was never a valid receiver.

But, the "immunity" of the receiver is governed by the appointing order which states as follows:

> The Receiver and all persons whom he may engage or employ to assist him in carrying out his duties and obligations hereunder shall not be liable for act or omission of the Receiver or such person, or any of their partners, employees, or agents **unless it shall be proven that the Receiver or such other person acted recklessly and in bad faith**. (emphasis added) (*Id.* at 10).

The Georgia law with regard to the appointment of receivers and their powers and

immunities clearly limits the powers and immunities of Georgia equity receivers to those listed in the appointing order:

> O.C.G.A § 9-8-8. Receiver as officer of court; removal of receiver
> (a) The receiver is an officer and servant of the court appointing him, *is responsible to no other tribunal than the court, and must in all things obey its direction.*
> (b) The receiver shall discharge his trust *according to the orders or decrees of the court appointing him.* He is at all times subject to its orders and may be brought to account and removed at its pleasure. (emphasis added).

Therefore, even if Respondent had been constitutionally appointed, which he was not, he did not have judicial immunity because the appointing order stated he was liable for bad faith and reckless conduct.

Qualified Immunity

Lambros claims that he is entitled to qualified immunity. (Resp. Br. at 14) In *Andujar v. Rodriguez*, 486 F.3d 1199, 1202-1203 (11th Cir. 2007), the court defined qualified immunity as follows:

> Qualified immunity protects government officials performing discretionary functions from suits in

> their individual capacities unless their conduct violates *'clearly established statutory or constitutional rights of which a reasonable person would have known.'* ... (internal citations and footnote omitted).

Qualified immunity does not apply where there is a violation of a constitutional right which was "clearly established at the time of the violation." *Pearson v. Callahan*, _____ U.S. _____, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009).

The constitutional rights which Petitioners contend were violated by the seizure of their property are "clearly established statutory or constitutional rights of which a reasonable person would have known." It is well established that the due process clause prohibits the state government from depriving its citizens of property without providing hearings "at a meaningful time." *See, e. g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950). *Fuentes v. Shevin*, 407 U.S. 67, 71 n.3, 92 S.Ct. 1983, 1989 n.3, 32 L.Ed.2d 556 (1972); *Hollis v. Itawamba County Loans, et al.*, 657 F.2d 746, 748 (5th Cir. 1981).

If the government fails to comply with the dictates of the Due Process Clause, the aggrieved party can seek compensatory damages and equitable relief under 42 U.S.C. § 1983. *McKinney v. Pate*, 20 F.3d 1550, 1555, 1557 (11th Cir. 1994) (en banc); *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003).

There were no hearings before or after the seizure. Petitioners' property was just plain stolen by a person acting under an invalid receivership appointment.

Conclusion

It is not too late for this Court to correct the misunderstanding of the original opinion in *Barton v. Barbour* and the fact that the entire issue of suits against receivers relevant to this case has been resolved and stated by statute, 28 U.S.C. §959(a) and 11 U.S.C. §543(b). It is wrong for federal courts to apply what is called the *Barton* Doctrine which does not even exist as a matter of federal law. Respondent insists that nine of the eleven circuits have applied this fictitious doctrine, the latest being the Eleventh Circuit in this case. Only this Court can correct the matter and bring this travesty to an end.

Second, this Court must insist that federal courts apply the clear law of the state in which events occur when that law is controlling. Georgia law, including the Georgia constitution, holds that acts done pursuant to a statute subsequently declared unconstitutional are legal nullities and void *ab initio*. The Eleventh Circuit refused to follow this rule and instead held such acts were valid until the statutes were declared unconstitutional. This erroneous ruling will no doubt be cited to protect acts taken under a statute later declared unconstitutional. This court should prevent the Eleventh Circuit ruling in this case from surviving.

These two issues require this Court to grant certiorari in this case because the failure to do so will result in the survival of unsupported and legally wrong law in the federal system.

Respectfully submitted,

WILLIAM EUGENE RUTLEDGE
Counsel of Record
RUTLEDGE & YAGHMAI
3800 Colonnade Parkway
Suite 490
Birmingham, AL 35243
Telephone: 205.969.2868
williamerutledge@aol.com